

These are the tentative rulings for civil law and motion matters set for Tuesday, October 21, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Monday October 20, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0043437 Unifund CCR Partners vs. McGarry, Daniel

Defendant Daniel McGarry's Motion for Mandatory Dismissal; Set Aside Default and Default Judgment; and Quash Service of Summons is granted.

As a preliminary matter, the court notes that defendant's motion exceeds page limit requirements. Cal. R. Ct., rule 3.113(d). The court has elected to exercise its discretion, and consider defendant's motion.

The court takes judicial notice of two proofs of service filed in this action on July 1, 2010 and March 16, 2011. The proof of service filed July 1, 2010, states that service of the summons and complaint was effected by substituted service on Crystal "Doe" on June 27, 2010 at 1:04 p.m. The proof of service filed March 16, 2011 states that service of the amended summons and amended complaint was effected by substituted service on Crystal "Doe" on June 27, 2010 at 1:04 p.m. Both proofs of service were signed by process server Travis Croft on June 28, 2010, and both include a declaration of mailing signed by Russell Duane on June 28, 2010. The proofs of service, filed several months apart, raise questions regarding the manner in which they were executed. However, plaintiff has filed no opposition to defendant's motion.

Further, defendant and his sister, identified in the proofs of service as Crystal "Doe", have filed declarations attesting to the fact that the service address was neither defendant's residence (as stated on the proofs), or his usual mailing address. Defendant has adequately rebutted the presumption of proper service, and both the default entered on April 13, 2011, and the default judgment entered on March 10, 2014, shall be set aside. For the same reason, service of summons must be quashed. Code Civ. Proc. § 418.10(a)(1).

Finally, as defendant has demonstrated that he was not served with the summons and complaint within three years after the action was commenced, dismissal is mandatory. Code Civ. Proc. §§ 583.210, 583.250.

2. M-CV-0061237 Vogelsang USA, Inc. vs. Heron Innovators, Inc.

This tentative ruling is issued by the Honorable Mark S. Curry. If oral argument is requested, it shall be heard on October 21, 2014 at 8:30 a.m. in Department 32.

Plaintiff's Demurrer to Answer is overruled in part, and sustained in part with leave to amend.

The demurrer is overruled with respect to defendant's second, third, fourth, fifth, ninth, tenth, eleventh, twelfth, thirteenth, nineteenth, twentieth, twenty-first, twenty-second, and twenty-third affirmative defenses. Each of these affirmative defenses is sufficiently pled so as to apprise plaintiff of the basis for the defense.

The demurrer is sustained with leave to amend with respect to defendant's sixth, seventh, eighth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, and twenty-eighth affirmative defenses. These affirmative defenses either appear to be inapplicable to the contract claims stated in the complaint, or aver insufficient factual allegations to apprise plaintiff of the basis for the defense.

Any amended answer shall be filed and served by no later than November 4, 2014.

3. M-CV-0061975 L & S Framing Inc., et al vs. World Wide Vintage Autos, LLC

The Motion to Dismiss is dropped. No moving papers were filed with the court.

4. S-CV-0031137 Ripper, John vs. Stevenson, Matthew, et al

The Motion to Tax Costs is continued to October 23, 2014 at 8:30 a.m. in Department 43 to be heard by the Honorable Michael W. Jones.

5. S-CV-0031530 Moore, Gregory M. vs. Wells Fargo Bank, N.A. et al

Plaintiff's Motion for Leave to File Second Amended Complaint is granted.

The court's discretion will usually be exercised liberally to permit amendment of the pleadings. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. Courts must apply a policy of great liberality in permitting amendments to the complaint "at any stage of the proceedings, up to and including trial," unless prejudice to the adverse party is shown. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761. That permitting amendment may expand the case by adding new causes of action requiring additional discovery does not constitute prejudice sufficient to deny leave to amend. *See Hirsu v. Superior Court* (1981) 118 Cal.App.3d 486, 490. The court will

not, at this stage, determine the validity of the proposed amendments. *See Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.

Plaintiff shall file and serve his second amended complaint by no later than October 31, 2014.

6. S-CV-0031533 Coppedge, Steven vs. Vericrest Financial, Inc., et al

Defendants Citimortgage, Inc. and CR Title Services, Inc.'s Motion for Summary Judgment was continued by the moving party to November 21, 2014 at 8:30 a.m. in Department 40.

7. S-CV-0032599 Chung, Arnold, et al vs. Leipsic, Reginald

The Motion to Deem Requests for Admission Admitted was continued to October 28, 2014 at 8:30 a.m. in Department 40.

8. S-CV-0032609 Wilson, Aliessia vs. Roseville City School District

The Petition to Approve Compromise of Minor's Claim is dropped. No moving papers were filed with the court.

9. S-CV-0032679 International Fidelity Insurance Co. vs. Tolani, Tony, et al

Motion for Leave to Amend Answer

International Fidelity Insurance Company's ("IFIC's") Motion for Leave to Amend its Answer to Defendant/Cross-Complainant Ludek Fabinger's Cross-Complaint is granted.

The court's discretion will usually be exercised liberally to permit amendment of the pleadings. *Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939. Courts must apply a policy of great liberality in permitting amendments to the complaint "at any stage of the proceedings, up to and including trial," unless prejudice to the adverse party is shown. *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761. That permitting amendment may expand the case by requiring additional discovery does not constitute prejudice sufficient to deny leave to amend. *See Hirsu v. Superior Court* (1981) 118 Cal.App.3d 486, 490. The court will not, at this stage, determine the validity of the proposed amendments. *See Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.

While defendant/cross-complainant Ludek Fabinger ("Fabinger") asserts that he will be prejudiced in that additional discovery is warranted, he fails to explain why a 100 day continuance and additional depositions and written discovery would be warranted based on the amendments requested by IFIC. Fabinger's request for additional conditions to be imposed is denied.

IFIC shall file and serve its amended answer by no later than October 24, 2014.

Motion for an Order Further Enjoining Pursuit of Collection Efforts

The parties' requests for judicial notice are granted. Fabinger's Objections to Evidence are ruled on as follows: Objection Nos. 1 and 3 are sustained. Objection Nos. 2 and 4 are overruled. IFIC's Objections to Evidence are ruled on as follows: Objection Nos. 1, 4 and 5 are overruled. Objection Nos. 2 and 3 are sustained.

IFIC's Motion for an Order Further Enjoining Pursuit of Collection Efforts Outside of the Interpleader Action is granted.

By order of this court dated June 14, 2013, Fabinger and the other defendants in this action were enjoined from "instituting or further prosecuting any proceedings affecting the rights and obligations of the parties to this action with respect to the interpleaded funds..." The interpleaded funds constitute the penal sum of the subject bond in the amount of \$3 million. Fabinger is a claimant with respect to said funds, and obtained a judgment against IFIC for \$3 million plus interest, which was recently affirmed on appeal. Other claimants to the bond amount have also obtained judgments against IFIC, which were also affirmed on appeal. Prior to the Court of Appeal's rulings, IFIC filed this interpleader action by depositing the entire \$3 million penal sum of the subject bond, and obtained an order of the court discharging and exonerating IFIC from any and all liability with respect to amounts owed under the bond.

With respect to the judgment obtained by Fabinger and the other claimants in the prior action, IFIC has been discharged with respect to amounts encompassed by the penal sum of the bond, and consequently Fabinger may not demand payment from the supersedeas bond obtained by IFIC for purposes of its appeal. Fabinger's ability to obtain damages against IFIC in excess of the penal sum of the bond remains an issue set to be determined in the instant action.

Fabinger is therefore restrained and enjoined from pursuing claims against the proceeds of the supersedeas bond issued by Allegheny Casualty Company for purposes of satisfying the judgment obtained in the prior action.

Motions for Judgment on the Pleadings

IFIC's Motion for Judgment on the Pleadings against defendants Blake Riva, Harry Frampton and Jim Telling is dropped as moot in light of the dismissal of cross-complaint filed on October 16, 2014.

IFIC's Motions for Judgment on the Pleadings against the Tolani Claimants and Ludek Fabinger are denied. IFIC's requests for judicial notice are granted.

A motion for judgment on the pleadings may be made on the ground that the operative pleading fails to state facts sufficient to constitute a cause of action against the moving defendant. Code Civ. Proc. § 438(c). The grounds for such a motion must appear from the face of the challenged pleading or from matters of which the court may take judicial notice. Code Civ. Proc. § 438(d). IFIC asserts that cross-complaints filed by the Tolani Claimants and Ludek

Fabinger fail to assert valid causes of action because they are not entitled to damages in excess of the penal sum of the subject bond, and because the statute of limitations bars their claims.

Under *Burns v. Massachusetts etc. Ins. Co.* (1944) 62 Cal.App.2d 972, 975 (*Burns*), a surety may be liable for prejudgment interest even if the payment of interest causes the surety's total liability to exceed the amount of its bond. *Id.* at 975. When the payment of interest causes the surety's liability to exceed the face of the bond, interest accrues from the time payment from the surety is due, as damages for the surety's own withholding rather than the principal's default. *Id.* at 975-976.

IFIC attempts to distinguish the types of surety bonds at issue in *Burns*, which involved an adult guardianship (now referred to as a conservatorship), and the surety bond at issue in this case, issued under Business and Professions Code section 11013.2 to protect purchasers of subdivision lots. However, IFIC offers no persuasive reason to find that the general proposition of *Burns* would not apply in this context. Further, *Burns* did not characterize prejudgment interest in excess of the penal sum of the bond as tort damages for bad faith actions of the surety. Rather, under *Burns*, when liability becomes fixed, and the surety fails to pay as required, interest begins to accrue from that date.

Further, as cross-complainants claims are founded upon a written instrument, a four-year, rather than two-year, statute of limitations applies, and the statute of limitations does not bar the claims.

Finally, the court finds that the second cause of action stated in the cross-complaints, for declaratory relief, adequately alleges a cause of action against IFIC.

10. S-CV-0033533 Davis, Thomas, et al vs. Ford Motor Company

The Motion to Sever is dropped in light of the court's ruling granting defendant's motion for summary judgment on October 14, 2014.

11. S-CV-0033793 Barcelles, Sheri vs. Kelada, Youssry

The Motion to Compel Independent Medical Examination was dropped by the moving party.

12. S-CV-0033957 Markham, David, et al vs. BBC Ventures, LLC, et al

Motion to Compel Responses to Request for Production of Documents, Set One

Plaintiff's Motion to Compel Defendant BBC Ventures to Provide Responses to Request for Production of Documents, Set One, is granted. Defendant BBC Ventures shall serve verified responses to the subject discovery, without objections, by no later than November 7, 2014.

Plaintiff's request for sanctions is denied, as the motion was unopposed. Code Civ. Proc. § 2031.300(c). Although California Rules of Court, rule 3.1348(a) purports to authorize

sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

Motion to Compel Responses to Special Interrogatories, Set One

Plaintiff's Motion to Compel Defendant BBC Ventures to Provide Responses to Special Interrogatories, Set One, is granted. Defendant BBC Ventures shall serve verified responses to the subject discovery, without objections, by no later than November 7, 2014.

Plaintiff's request for sanctions is denied, as the motion was unopposed. Code Civ. Proc. § 2030.290(c). Although California Rules of Court, rule 3.1348(a) purports to authorize sanctions if a motion is unopposed, the court declines to do so, as the specific statute governing this discovery authorizes sanctions only if the motion was unsuccessfully made or opposed. Any order imposing sanctions under the California Rules of Court must conform to the conditions of one or more of the statutes authorizing sanctions. *Trans-Action Commercial Investors, Ltd. v. Firmaterr Inc.* (1997) 60 Cal.App.4th 352, 355.

Motion to Deem Request for Admissions, Set One, Admitted

Plaintiff's Motion to Deem Requests for Admissions, Set One, to Defendant BBC Ventures Admitted is granted. The subject requests for admission shall be deemed admitted.

Plaintiff is awarded sanctions in the amount of defendant BBC Ventures and its counsel in the amount of \$310. Code Civ. Proc. § 2033.280(c).

13. S-CV-0034057 Le, Thanh vs. Sushi Unlimited LLC

The Motion to Compel was dropped at the request of the moving party.

14. S-CV-0034230 Dokimos, Steven, et al vs. PNC Mortgage, et al

Defendant PNC Mortgage's ("PNC's") request for judicial notice is granted. PNC's objection to the Declaration of Terri Ramirez is sustained.

PNC's Demurrer to First Amended Complaint is overruled in part, and sustained in part, with leave to amend.

PNC's Demurrer is sustained with leave to amend as to plaintiffs' first cause of action for violation of Civil Code section 1708.7, second cause of action for violation of Civil Code § 1708.9(a)-(c), and third cause of action for violation of Civil Code section 1708.8(e). The first amended complaint ("FAC") alleges insufficient facts to demonstrate that the "strange visitors" who repeatedly came to their home were agents of PNC. Plaintiffs simply identify the individuals as PNC agents, but no facts are alleged to support this conclusion. The FAC alleges

that in some cases the individuals identified themselves as employees of an insurance company or realtor, and that in one case police reported the individual had been previously stopped for staring into windows of a different residence. For the same reason, the Demurrer is sustained as to plaintiffs' twelfth cause of action for intentional infliction of emotional distress, which is not adequately pled. As it appears to the court that plaintiffs can amend to assert additional facts to support an agency relationship between the individuals and PNC, plaintiffs shall be given leave to amend each of these causes of action.

PNC's Demurrer is overruled with respect to plaintiffs' fourth cause of action for violation of Civil Code section 2923.5, fifth cause of action for violation of Civil Code section 2923.55, sixth cause of action for violation of Civil Code section 2923.6(c), seventh cause of action for violation of Civil Code section 2923.6(f), eighth cause of action for violation of Civil Code section 2923.7, and ninth cause of action for violation of Civil Code section 2924.10.

PNC's Demurrer is sustained with leave to amend with respect to plaintiffs' tenth cause of action for violation of Civil Code section 2924.17. The recorded documents attached to the FAC do not demonstrate irregularities sufficient to void any part of the foreclosure process. Further, plaintiffs fail to allege any resulting prejudice based on purported errors.

PNC's Demurrer is sustained with leave to amend with respect to plaintiffs' eleventh cause of action for promissory estoppel. Plaintiffs allege that PNC promised to consider plaintiffs for a loan modification. There is no obligation on loan servicers to modify borrowers' loans. *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 223. Where the alleged promise is conditional on its face, the purported promise is not "clear and unambiguous on its terms" and a claim for promissory estoppel must fail. *Laks v. Coast Fed. Savings & Loan Ass'n* (1976) 60 Cal.App.3d 885, 891. Plaintiffs also fail to sufficiently allege detrimental reliance. With respect to the assertion that they forewent a restructured bankruptcy, plaintiffs fail to allege that they qualified for bankruptcy protection, that bankruptcy protection would have saved their home from the foreclosure process, or that defendants were aware of plaintiffs' intention to file for bankruptcy, and made specific promises to them with the reasonable expectation that plaintiffs would rely on such promises to induce plaintiffs to forbear from pursuing bankruptcy. *See Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 227-228.

Any amended complaint must be filed and served by no later than November 7, 2014.

15. S-CV-0034255 Heard, William vs. Ford Motor Company

The Motion to Compel is dropped in light of notice of transfer of the motion to a discovery referee.

16. S-CV-0034379 Kuan, Rong, et al vs. Querimit Fastidio, Dennis Rhyon, et al

The Petition to Approve Compromise of Minor's Claim is granted. If oral argument is requested, appearance of the minor is excused.

17. S-CV-0034491 990 Reserve Drive, LLC vs. Schroeder, Daniela, et al

Demurrer to Complaint

Defendants Dave Chambers and Samuel Lee Hales' ("Defendants'") request for judicial notice is granted as to Exhibits A, B and C, and denied as to Exhibit D.

As a preliminary matter, Defendants Demurrer to Complaint is dropped as moot with respect to plaintiff's first, second, sixth, seventh and eighth causes of action, as plaintiff admits that these causes of action are not pled against moving Defendants.

In all other respects, Defendants' Demurrer to Complaint is overruled.

A party may demur to the complaint where the pleading does not state facts sufficient to constitute a cause of action, or where the pleading is uncertain. Code Civ. Proc. § 430.10(e), (f). A demurrer tests the legal sufficiency of the pleadings, not the truth of the allegations, or the accuracy of the described conduct. *Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733. Upon review of the complaint, it alleges sufficient facts to support causes of action for fraud and deceit (concealment), breach of the duty to disclose, breach of the duty to be honest and truthful, and unfair business practices.

Motion to Strike

As a preliminary matter, Defendants' Motion to Strike is dropped as moot with respect to allegations set forth in plaintiff's first, second, sixth, seventh and eighth causes of action, as plaintiff admits that these causes of action are not pled against moving Defendants.

In all other respects, Defendants' Motion to Strike is denied. The complaint alleges sufficient facts to support a request for punitive damages against demurring Defendants.

Defendants shall file and serve their answer to the complaint by no later than November 4, 2014.

18. S-CV-0034705 Kaniu, Sam, et al vs. EMC Mortgage Corp., et al

Defendant Select Portfolio Servicing, Inc.'s ("SPS's") request for judicial notice is granted.

SPS's Demurrer to First Amended Complaint is sustained as to plaintiffs' first, third, fourth, fifth and sixth causes of action without leave to amend.

Plaintiffs' first cause of action for breach of contract – loan modification fails to state a valid claim against SPS, as plaintiffs fail to allege the existence of a contract between themselves and SPS. Plaintiffs allege that where a lender approves a Trial Plan Payment (TPP), and the borrower complies with the terms of the TPP, and the borrower's representations remain true and correct, the lender must offer a permanent loan modification. However, according to the

allegations of the first amended complaint, the HAMP Trial Plan Agreement was received from defendant EMC Mortgage Corp. (“EMC”) in March 2009, and plaintiffs were denied a permanent loan modification by EMC in March 2010. Plaintiffs fail to explain how SPS could also be held liable for failing to provide a permanent loan modification based on EMC’s Trial Plan Agreement, approximately four years after EMC had purportedly breached the agreement, particularly since plaintiffs never received a Trial Plan Agreement from SPS, and had been denied a loan modification long before SPS took over as loan servicer.

Plaintiffs’ fourth cause of action for wrongful foreclosure fails to state a valid claim against SPS. The only assertion within this cause of action that would implicate SPS is the purported violation of Civil Code section 2924(a)(1)(C), which requires a Notice of Default to contain a statement “setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.” Upon review of documents of which the court may take judicial notice, the subject Notice of Default contained the requisite statement. Plaintiffs’ assertion that they were not actually in default because EMC wrongfully denied them a permanent loan modification does not establish a breach of this provision.

Plaintiffs’ sixth cause of action for violation of Business and Professions Code sections 17200 *et seq.* fails to state a valid claim against SPS. This claim is entirely based on the allegations supporting plaintiffs’ other causes of action, and fails for the same reasons stated above, and further because plaintiffs fail to allege any unfair business practices by SPS.

Plaintiffs concede that their third cause of action for promissory estoppel and fifth cause of action for fraud fail to state valid claims against SPS.

Plaintiffs bear the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiffs that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. The first amended complaint does not suggest on its face that it is somehow capable of amendment and plaintiffs have failed to make any showing that it can be amended to change its legal effect. Accordingly, the demurrer is sustained without leave to amend.

19. S-CV-0034841 Ornelas, Anthony vs. Hyundai of Roseville, LLC

The Motion to Compel Arbitration and Stay Proceedings is continued to November 18, 2014 at 8:30 a.m. in Department 40.

20. S-CV-0034907 Anderson, Angela vs. Wal-Mart Stores, Inc., et al

The Motion to Set Aside Default is dropped in light of the stipulation and order setting aside the default filed October 2, 2014.

21. S-CV-0035113 Hayes, K. - In Re the Petition of

The Petition for Approval of Transfer of Structured Settlement Payment Rights is granted.

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